TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted]44

JUAN A. MONAGAS, JOSE ARTURO MONAGAS, ET AL., APPELLANTS,

vs.

JULIANA MARIA ALBERTUCCI Y ALVAREZ, WIDOW OF DOMINGUEZ.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

FILED JULY 24, 1912.

(23,307)

(23,307)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 311.

JUAN A. MONAGAS, JOSE ARTURO MONAGAS, ET AL., APPELLANTS,

vs.

JULIANA MARIA ALBERTUCCI Y ALVAREZ, WIDOW OF DOMINGUEZ.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1914.

Record of the Proceedings of the District Court of Mayaguez and of the Supreme Court of Porto Rico, in the within Entitled Cause Numbered 2415 and 551, in said Respective Courts, the Same Having Been Disposed of at the Third Regular Term, A. D. 1911, the Following Papers Having Been Filed and Proceedings Had Therein, to wit:

In the District Court of the Judicial District of Mayaguez, P. R.

Action for Redemption of Urban Property.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, OSCAR PROCOPIO MONAGAS, ROSARIO DE LA ROSA

vs.

JULIANA MARIA ALBERTUCCI Y ALVAREZ, Viuda de Dominguez.

Amended Complaint.

To the Honorable Court:

The Plaintiffs, by their attorneys who subscribe hereto, present their complaint against Juliana Maria Albertucci y Alvarez, widow of Dominguez, and as their cause of action allege:

I.

2 That on the 6th day of September, 1905, the plaintiffs had been for a long time proprietors of the following property, whose true description is:

A brick house of one story with flat roof, having three iron doors in front and five on the left side going out, with iron columns to sustain the roof, upon which there is a brick mirador roofed with galvanized iron, the cornice having an iron railing; the house measures 12.35 meters front to the East on Peral Street, 20.02 meters in depth on the north, or Mendez Vogo street, side, 19.57 meters on the south side, and 12 meters across the west end, and is constructed on a lot forming part of the Commons of the City. This house has its principal front on said Peral Street, is marked with the number 58, and is bounded on the right as you enter by Mendez Vogo street already mentioned, in the rear by the house of Dr. Adolfo Martinez Cerecedo, formerly of Don Juan Suaña, and on the left by that of Don José Ramón Castro, today his heirs, and Don Rafael Blanes as co-owners; which property was reasonably worth the sum of seven thousand five hundred dollars.

II.

That about the 6th of September, 1906, the plaintiffs being in need of money requested as a loan from the defendant the sum of six

thousand dollars; and that on said 6th day of September, 1906, said defendant loaned to the plaintiffs said sum of six thousand dollars, requiring that for the security and guaranty of said sum and its interest the plaintiffs should execute in favor of defendant a conditional deed of transfer, dated September 6, 1906, passing to her conditionally the absolute dominion of the property above described, which deed was duly recorded in the office of the Registrar of Property of Mayaguez on the 12th day of October, 1906; all of which is more fully proven from the copy of said deed and the Certificate of the Registrar which are attached marked Exhibit "A" and made a part of this complaint.

III.

The plaintiffs allege that said conditional deed, although it appears to be one of sale, was not made between the plaintiffs and the defendant as such sale, but that in the act of executing said
3 conditional deed it was understood and agreed by and between the plaintiffs and the defendant that said conditional deed and the property transferred should be reserved by the defendant as a guaranty of the payment of said sum of six thousand dollars and interest thereon at the legal rate; and it was also agreed between these plaintiffs and the defendant that, upon payment being made by the former of the six thousand dollars and the interest due at the time of such payment to the defendant, said defendant would turn back said property and the conditional sale would remain without legal effect and without any force or validity.

IV.

The plaintiffs allege that on the 6th day of September, 1906, the defendant entered into possession of the described property and of the rents and profits thereof, all of which she still retains in her possession without rendering any account of the rents and profits to the plaintiffs or to any of them, although plaintiffs have often requested the same.

V.

The plaintiffs further allege that they have always been and still are ready to pay to said defendant whatever sum may be due her as principal and interest, and that they have frequently requested an account of the same in order that they might thus arrive at a final liquidation and settlement.

VI.

The plaintiffs further allege that said defendant, for the purpose of depriving the plaintiffs of the benefit of the right to redeem said property above described, now pretends and claims that said deed of conditional transfer above mentioned was not executed as security
for said sum of six thousand dollars and interest thereon, as
4 above stated, but she pretends that said sum of six thousand dollars was delivered to the defendant by the plaintiffs by

virtue of an absolute conditional sale of the property above mentioned, and that it was not agreed between the plaintiffs and the defendant that said deed was for the security of the amount stated and interest; and that said defendant refuses to account to the plaintiffs for the rent of the property hereinbefore mentioned and to return it to said plaintiffs, although the latter at the proper time communicated with her for that object and offered to pay to said defendant all which was owed to her.

VII.

The plaintiffs also allege that, notwithstanding the agreement between plaintiffs and defendant, said defendant on the 14th day of September, 1908, presented in the Registry of Property of Mayaguez said deed of the 6th of September, 1906, for the purpose of having it recorded in her name as an absolute final sale, in order to maliciously deprive the plaintiffs of the property aforesaid, then well knowing that it was only a mortgage.

VIII.

The plaintiffs pray that an account be taken of the rents and profits which as proceeds of the property aforesaid were received by the defendant, or which ought to have been received by her, and that upon the taking of such account there be deducted therefrom the amount of the interest accrued upon the sum loaned and the balance be applied as a payment upon the principal.

The plaintiffs therefore pray the Court to adjudge that said conditional deed be deemed a mortgage and an account be taken under the direction of this Honorable Court of what is due the defendant to date for the principal sum and interest aforesaid; that an account be also taken of the rents and profits produced by said property which the defendant has received, or which she or any other person in her name might have received without wilful negligence, from the time she took possession of said property; and that upon plaintiffs making payment, in case any amount may still be due the defendant for said principal sum and interest, which amount plaintiffs hereby offer to pay defendant, it be adjudged that said defendant return and deliver to plaintiffs the possession of said property and execute to them a good deed of transfer thereof, and that she deliver to plaintiffs all deeds, contracts and tax receipts pertaining to said property; and that these plaintiffs be allowed such further remedy as equity may require and to your Honor may seem meet, including the costs of this suit.

(Signed) F. L. CORNWELL,
FERNANDO VASQUEZ,
Attorneys for Plaintiffs.

(A proper affidavit is annexed.)

In the District Court of the Judicial District of Mayaguez.

Action for Redemption of Urban Property.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, OSCAR PROCOPIO MONAGAS, and ROSARIO DE LA ROSA

vs.

JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Dominguez.

Answer to Amended Complaint.

The subscribing attorney, in the name and representation of the above named defendant, answering the complaint, states:

6 I.

That she accepts as true the first paragraph of the complaint as to the first part thereof, that is, that plaintiffs, prior to the 6th of September, 1906, were the owners of the house described in said paragraph; but defendant denies the second part of said paragraph, that is, that said house was worth at that time seven thousand five hundred dollars.

II.

Referring to the second paragraph of the complaint, defendant denies that plaintiffs requested of her a loan of six thousand dollars or that she made the loan on the 6th of September, 1906, or at any other time; therefore the defendant also denies that the plaintiffs transferred to her conditionally the absolute dominion of the house described in the first paragraph of the complaint as security for said amount and interest thereon.

III.

Referring to the third paragraph of the complaint, defendant denies that the deed referred to, although appearing as a sale, was not made as such sale; and defendant also denies that it was agreed between her and the plaintiffs that said deed should have as its only purpose to serve as a guaranty for the payment of the six thousand dollars and interest at the legal rate; neither is is true, and so defendant denies that it was agreed between plaintiffs and defendant that they had to return said six thousand dollars and interest thereon and that, upon their returning it, she had to return to them the house described, and that the sale with covenant of return would remain without legal effect, force or validity.

IV.

The defendant accepts as true in part the fourth paragraph of the complaint, that is, that she entered into the possession and enjoyment of the property described in the complaint, and that she
7 still is, without having rendered an account of any kind to the plaintiffs. And defendant denies that plaintiffs or any of

them have ever at any time requested any accounting relative to the income from the property referred to.

V.

The defendant denies that plaintiffs have been and are disposed to pay any sum of money for which they may be indebted for principal and interest; and defendant also denies that plaintiffs have at any time requested from her the accounting and final liquidation to which said plaintiffs refer in said paragraph.

VI.

Referring to the sixth paragraph of the complaint, defendant denies that plaintiffs have a right to redeem the property described in the complaint, and therefore it is true that said defendant claimed and pretends that the deed which is attached to the record was executed as a sale with covenant for return under the conditions stated in the same, and that it was not executed, as plaintiffs say, as security for the six thousand dollars and interest. Defendant denies the unwarranted and malicious statement made by plaintiffs that they agreed with defendant that said deed was as a guaranty of the amount expressed and interest. It is true that defendant refuses, or, better said, denies liability, to render an account to plaintiffs of the rents produced by the house described in the complaint and to return said house to them. The defendant denies the statement made by plaintiffs that the latter have addressed themselves to her at any opportune time offering to pay her any amount whatever in the way of a debt.

VII.

8 Defendant denies that she has made any contract whatever with plaintiffs by way of a loan, it being true that on the 14th day of September, 1908, she presented in the Registry of Property of Mayaguez said deed of the 6th of September, 1906, in order to record it in her name as a sale absolute, irrevocably consummated, but it not being true that said record had for its object to deprive plaintiffs of said property; but on the contrary, not being true, as it is not, that said deed involved a contract of mortgage loan, and it being one of sale with covenant of return as appears from the deed itself, she asked for its recording in use of the right which it gave her derived from the covenants contained in said deed.

By virtue of the foregoing, I pray the Honorable Court, in due course of legal procedure, to be pleased to give judgment at the proper time declaring unfounded each and all of the claims of the plaintiffs and imposing upon them the costs and whatever in addition justice requires.

San Germán, for Mayaguez, November 16, 1909.

(Signed) M. JUAN LLANERAS,
Attorney for Defendant.

(A proper affidavit is annexed.)

In the District Court of Mayaguez.

No. 2415, Civil.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, OSCAR PROCOPIO MONAGAS, and ROSARIO DE LA ROSA
versus
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Dominguez.

Redemption of Urban Property.

Statement of Facts Found and Conclusions of Law.

9 This cause was called for trial on the 11th day of February, 1910, the plaintiffs appearing by their attorneys F. L. Cornwell and Fernando Vasquez, and the defendant by her attorney, Miguel Juan Llaneras. The pleadings being read, the proofs presented, and the briefs presented by both parties considered, the Court reserved its decision until this day on which it presents the following statement of facts found and conclusions of law:

Facts Found.

I.

On the 6th day of September, 1906, the plaintiffs were owners of the property described in the complaint, which on that date was worth seven thousand dollars and is to day worth eight thousand dollars.

II.

At the time indicated the plaintiffs, needing money, sought a loan from the defendant in the sum of six thousand dollars, and on the 6th day of September, 1906, said defendant loaned to the plaintiffs the sum of $6,000, requiring that for the security and guaranty of said sum and interest the plaintiffs should execute in favor of defendant a deed of sale with covenant of return transferring to her the conditional dominion of the property referred to; which deed was recorded in the Registry of Property.

III.

The deed of sale with covenant of return, although it appeared to be a sale, was not made as such sale, on the contrary in the act of execution of said conditional deed it was understood and agreed between the plaintiffs and the defendant that said conditional deed and the property transferred should be held by defendant as a guaranty for the payment of said sum of $6,000 and interest thereon. No rate of interest was specified, but it was agreed that defendant should take possession of the property and should collect, as
10 in lieu of interest, all the income from the same. It was also agreed that if the plaintiffs paid back the $6,000 within two

years, the conditional sale should remain without legal effect, the plaintiffs being privileged to extend said term one year more if at the end of said term they should expend one hundred dollars in repairing the house.

IV.

On the 6th day of September, 1905, the defendant entered into possession of the property and of its rents and profits, also paying the taxes. The house was at first leased to Infanzon & Rodriguez who paid her rent, first at the rate of $50, and later at the rate of $55 per month, and during the last two years she has it rented to Don Santiago Caino who pays $60 per month. Upon taking possession of the house this lessee made repairs of the value of more than $100 which were settled by the defendant. The plaintiffs never asked either for the possession of the house or any accounting of rents and profits.

V.

At the end of the term of two years specified in the deed of sale with covenant of return, the plaintiffs attempted to make use of the extension mentioned in the deed, which they did not accomplish; but it has not been proven either by the plaintiffs or by the defendant for what reasons the term was not extended. On the 14th of September, 1908, the defendant caused to be annotated in the Registry of Property of Mayaguez the consummation of the sale. After that date the plaintiffs continued attempting to extend the term. On the 5th of May, 1909, the plaintiffs wrote to the defendant offering to pay the sum owed and asking the cancellation of the covenant made.

At no previous time had the plaintiffs offered to pay said
11 amount nor had they asked for accounting or liquidation.

On the 14th of August, 1909, they presented their complaint praying for substantially the same thing which was prayed for in their amended complaint of the 10th of November, 1909.

Conclusions of Law.

First. It should be ordered that the defendant retransfer to the plaintiffs the property described in the complaint, if the plaintiffs within the reasonable term of fifteen days pay to the defendant, or deposit in the Court, the principal sum of six thousand dollars and one hundred dollars more in satisfaction of the repairs made by the defendant to the property referred to, the Marshal of this Court being required to execute the deed of re-sale in case the defendant refuses to do so.

Second. The plaintiffs have no right to require of the defendant any rendition of accounts.

Third. This suit should be decided without special imposition of costs.

Mayaguez, P. R., March 7, 1910.

(Signed) OTTO SCHOENRICH,
District Judge.

In the District Court of Mayaguez.

No. 2415, Civil.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, OSCAR PROCOPIO MONAGAS, and ROSARIO DE LA ROSA
versus
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Dominguez.

Redemption of Urban Property.

Judgment.

This cause was called for trial on the 11th day of February, 1910, the plaintiffs appearing by their attorneys, Messrs. F. L. Cornwell and Fernando Vasquez and the defendant by her attorney, Mr. Miguel Juan Llanderas. The pleadings being read, the proofs presented, and the briefs presented by both parties considered, the Court reserved its decision until this day on which it presents its statement of facts found and conclusions of law; and, in accordance therewith, it is ordered that the plaintiffs, within the term of fifteen days, pay to the defendant the sum of six thousand dollars of principal and one hundred dollars more because of the betterments made on the property in controversy by the defendant, and that the defendant return and deliver to the plaintiffs the possession of said property and execute to them a good deed of transfer; and that, in case the same is denied, said sums be deposited within the term indicated with the Clerk of this Court at the disposal of the defendant, and that said deed be executed by the Marshal of this Court. And this decision is made without special imposition of costs.

Let this judgment be registered in the proper book of this Court, and let an order issue to the Marshal for its execution.

Given in Mayaguez on the 7th day of March, 1910.

(Signed) OTTO SCHOENRICH,
District Judge.

I certify:
JOSÉ BASORA Y MESTRE, *Clerk.*

On the 21st day of March, 1910, the plaintiffs duly entered their appeal from this judgment to the Supreme Court of Porto Rico.

On the 28th day of March, 1910, the defendant duly entered her appeal from this judgment to said Supreme Court of Porto Rico.

13 In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS et al., Plaintiffs and Appellants,
vs.
JULIANA MARÍA ALBERTUCCI Y ALVAREZ, Widow of Dominguez, Defendant and Appellant.

Appeal from a Judgment Rendered by the District Court of Mayaguez.

Opinion of the Court Delivered by Mr. Justice MacLeary, San Juan, Porto Rico, 5 of June, 1911.

This suit was brot for the redemption of a house and lot from a conditional sale which plaintiffs claim was only a mortgage. On the 7th day of March, 1910, the District Court of Mayaguez, in this case, rendered the following judgment, to wit:

"This cause came on to be heard on the 11th of February, 1910, the plaintiffs appearing thru their counsel, Messrs. F. L. Cornwell and Fernando Vasquez, and the defendant thru her counsel, Miguel Juan Llaneras Esq. After the arguments were heard and the evidence introduced the court considered the briefs filed by both parties, reserving its decision until the 7th of March, 1910, on which day the judge files findings of fact and conclusions of law; and in accordance therewith orders that the plaintiffs pay to the defendant, within the term of fifteen days, the sum of ($6,000) six thousand dollars as principal, plus ($100) one hundred dollars for the repairs made on the property in question by the defendant; and that the latter return and deliver to the plaintiffs the possession of such property, executing in their favor the necessary deed of conveyance; and in case she (the defendant) refuses to do this, that said sums be deposited, within the term described, with the Secretary of this court at the disposal of the defendant, and that said deed be executed by the Marshal of this court; and this case is decided without any special imposition of costs. Let this judgment be entered in the proper book of the court, and an order be issued to the Marshal for its execution."

From this judgment both parties appealed to this Court and the case was heard herein on the 11th of January last. Neither of
14 the parties appellant having complied with Rules 42 and 43 of this Court, at the hearing, on the close of the oral argument, attention was called thereto and, at their request, ten days' time was conceded to each of them to file their assignments of error. The plaintiffs, on the last day granted, filed an assignment, complying with the rules, but the defendant failed so to do.

Altho' the defendant failed to file an assignment of errors, in accordance with the permission granted her counsel on the day of the hearing in this Court, an exception was taken on the trial in the

court below, and is set out in the record, which presents her case clearly, and as it shows, if well founded, a fundamental error, may be considered by us here, in the absence of any objection thereto by the adverse party.

The record states it as follows:

"When the plaintiff, Juan A. Monagas, testified, the defendant objected that the plaintiffs were trying to introduce oral evidence to deny the existence of a written document; and that said oral evidence was inadmissible. The plaintiffs declared that they were going to prove that the document was not an instrument of sale, but that it had been the intention of the makers to constitute a mortgage. The defendant replied that only such a mortgage as appeared in a public deed, was valid. The judge admitted the evidence, and the defendant took an exception."

Then let us first examine this question, raised by the defendant's exception. She virtually maintains the proposition that parole evidence was inadmissible, under our Civil Code, to vary the terms of the sale; and that an improper construction was put on the written contract entered into between the parties.

The whole case really turns on the question whether the written instrument in controversy was a mortgage or a conditional sale. If it is the latter, it must be complied with according to its terms; if the former, the plaintiff must be allowed to repay the money received and take a reconveyance of the land. The real intention of the parties at the time the written instrument was made must govern in the interpretation given to it by the courts. This must be ascertained from the circumstances surrounding the transaction and from the language of the document itself. The correct test, where it can be applied, is the continued existence of a det or liability between the parties. If such exists, the conveyance may be held to be merely a security for the det or an indemnity against the liability. On the contrary, if no det or liability is found to exist, then the transaction is not a mortgage but merely a sale with a contract of repurchase within a fixt time. While every case depends on its own special facts, certain circumstances are considered as important, and the courts regard them as throwing much light upon the real intent of the parties and upon the nature of such transactions: such *are* the existence of a collateral agreement made by the grantor for the payment of money to the grantee, his liability to pay interest, inadequacy of price paid for the conveyance, the grantor still remaining in possession of the land conveyed, and any negotiation or application for a loan made preceding or during the transaction resulting in the conveyance.

The American doctrine on this subject does not differ materially from the principles set forth in our Civil Code.

3 Pomeroy's Equity Jurisprudence, paragrafs 1194 & 1195.
Civil Code of Porto Rico, paragrafs 1248, 1249, 1250, 1348, 1410, and 1421.

In accordance with these principles we must consider the conveyance in this case as a conditional sale and that plaintiff has failed to comply therewith.

We are further satisfied that the exception of the defendant was well taken and ought to have been sustained; and that the court consequently erred in its judgment. Since all the plaintiffs' as-
16 signments of error are based on the assumption that the fundamental instrument of writing was a mortgage and we find it to be a conditional sale, it is unnecessary to further consider them here.

In regard to the first legal point submitted by the plaintiffs, in addition to their assignment of errors, we cannot agree that a false consideration is stated in the contract and therefore decline to hold it null under section 1243 of the Civil Code. The second legal point is immaterial under the views we take of the law and the facts of the case as presented in the record.

Taking these views, the judgment should be reversed and the complaint be dismist without special imposition of costs.

(Signed) J. H. M'LEARY.

In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS et al., Plaintiffs and Appellants,
vs.
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Dominguez, Defendant and Appellant.

Appeal from a Judgment Rendered by the District Court of Mayaguez.

Judgment.

San Juan, Porto Rico, on the 5th of June, 1911.

This Court has carefully examined the transcript of the record presented for the purpose of the appeal interposed in the above entitled cause, and has given due consideration to the arguments of the parties in support of their respective contentions; and for the reasons set forth in the opinion which accompanies this judgment
17 it decides to revoke, as it does revoke, that given by the District Court of Mayaguez and declares the complaint dismissed, without special imposition of costs. And let it be communicated to the inferior court for the proper action. So we decide, direct and sign.

(Signed) JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.

(Filed Sept. 28, 1911.)

In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, OSCAR PROCOPIO MONAGAS, and ROSARIO DE LA ROSA
vs.
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Dominguez.

Petition of Appeal.

The plaintiffs and appellants in the above entitled cause, conceiving themselves to be aggrieved by the decision and judgment of this Court in said cause entered on the 5th day of June, 1911, whereby the judgment of the District Court from the Judicial District of Mayaguez was reversed and the complaint of plaintiffs dismissed, do hereby appeal from the decision and judgment of this Court aforesaid to the Supreme Court of the United States, for reasons to be specified in an assignment of errors to be filed herein, and they pray that this petition of appeal may be allowed, that this Court may prepare a statement of facts in the nature of a special verdict to be made a part of the record on this appeal as required by the Act of April 7, 1874, of the Congress of the United States, and that a transcript of the record and proceedings of the District Court aforesaid and of this Court, together with said statement of facts, duly authenticated, may be sent to said Supreme Court of the United States as provided by law.

San Juan, this 28th day of September, A. D. 1911.

N. B. K. PETTINGILL,
Counsel for Appellants.

18 (Filed October 31, 1911.)

In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, OSCAR PROCOPIO MONAGAS, and ROSARIO DE LA ROSA, Plaintiffs and Appellants,
vs.
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Widow of Dominguez, Defendant and Appellee.

Bond on Appeal.

Know all men by these presents, that we, Juan A. Monagas, José Arturo Monagas, Oscar Procopio Monagas and Rosario de la Rosa, as Principals, and Ramiro Vidal and C. J. Cedó, as sureties, are held

and firmly bound unto Juliana Maria Albertucci, widow of Dominguez, in the penal sum of Five Hundred Dollars, for the payment whereof well and truly to be made to the said Juliana Maria Albertucci, her executors, administrators or assigns, we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these Presents.

Sealed with our seals and dated this 12th day of October, A. D. 1911.

Whereas, the said Juan A. Monagas, José Arturo Monagas, Oscar Procopio Monagas and Rosario de la Rosa, the appellants in the above cause, have been allowed an appeal from the judgment of the Supreme Court of Porto Rico entered therein on the 5th day of June, 1911, to the Supreme Court of the United States, and a citation directed to said appellee is about to be issued upon said appeal:

Now, the condition of the above obligation is such, that if the said appellants shall prosecute their said appeal to effect and shall answer all costs, if they fail to make their plea good, then this obliga-
19 tion shall be void, else shall remain in full force and effect.

JUAN A. MONAGAS. [SEAL.]
JOSÉ A. MONAGAS. [SEAL.]
OSCAR P. MONAGAS. [SEAL.]
ROSARIO DE LA ROSA. [SEAL.]
C. J. CEDO. [SEAL.]
RAMIRO VIDAL. [SEAL.]

Witnesses:

EMILIO BENEVETTI.
MAGDALENO BAYA.

ISLAND OF PORTO RICO,
City of Mayaguez, ss:

Ramiro Vidal and C. J. Cedó, sureties named in the foregoing bond, after having been duly sworn by me according to law, say each for himself that he is a resident and freeholder in the municipality aforesaid and is worth more than the penal sum of said bond in real estate returned for taxation to the Government of Porto Rico and not exempt from execution for debt.

RAMIRO VIDAL.
C. J. CEDO.

No. 2982.

Subscribed and sworn to before me on this 12th day of October, 1911, by Ramiro Vidal and C. J. Cedó, of full age, property holders and residents of Mayaguez, and to me personally known.

[SEAL.] MARIANO RIERA PALMER,
Notary Public.

In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS et al., Plaintiffs and Appellants,
vs.
JULIANA MA. ALBERTUCCI, Widow of Dominguez, Defendant and Appellee.

Appeal from the District Court of Mayaguez.

Order.

SAN JUAN, PORTO RICO, *November* 6, 1911.

The appeal taken by N. B. K. Pettingill Esq. on behalf of Juan A. Monagas, José Arturo Monagas, Oscar Procopio Monagas and Rosario de la Rosa to the Supreme Court of the United States, from the judgment rendered by this Court on the 5th day of June, 1911, in the above entitled suit, is hereby allowed: the appellants being required to present a bond within the legal period in the sum of Five Hundred Dollars to answer for the costs which may be caused the appellee by the taking of this appeal, said bond to be approved by the President or any other of the Justices of this Court.

And appellants are allowed the term of sixty days for the preparation of the record which has to be transmited to the Supreme Court of the United States.

It was agreed upon and is signed by the Justices of this Supreme Court.

JOSÉ C. HERNANDEZ.
J. H. M'LEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.
PEDRO DE ALDREY.

In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS et al., Plaintiffs and Appellants,
vs.
JULIANA MA. ALBERTUCCI, Widow of Dominguez, Defendant and Appellee.

Appeal from District Court of Mayaguez.

Order Approving Bond.

SAN JUAN, PORTO RICO, *November* 6, 1911.

The bond presented by the appellants is aproved as to its form, amount and sufficiency of the sureties, for the purpose of the appeal taken to the Supreme Court of the United States.

The President of the Supreme Court agreed to it and signs it, to which I certify:

J. HERNANDEZ USERA, *Secretary.*

JOSÉ C. HERNANDEZ.

21 In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS et al.
vs.
JULIANA MARIA ALBERTUCCI Y ALVAREZ.

This Court, at the request of the plaintiffs and appellants, makes the following statement of facts in the nature of a special verdict to be forwarded to the Supreme Court of the United States, together with the record in said cause, pursuant to the provisions of the Act of Congress of April 7, 1874:

I.

On the 6th day of September, 1906, the plaintiffs executed a Notarial contract with the defendant, which is the following:

"In the city of Mayaguez, Island of Porto Rico, on the 6th day of September, 1906, before me, Miguel Juan y Llaneras, Lawyer and Notary in practice in this Island with residence and open office in San Germán, appear:

Of the first part, Don José Arturo Monagas y Cedó, of full age, married, property-owner and resident of this city; Don Juan Antonio Monagas y Cedó, of full age, married, pharmacist and resident of this city; Doña Rosario de la Rosa, of full age, property-owner, of this same locality and married to the former appearer, Don Juan Antonio Monagas y Cedó; and Don Oscar Procopio, José Maria Monagas y Cedó, dentist, resident of this city, nineteen years of age, who has obtained the benefit of full age by permission of the District Court of this Judicial District by an order dated the 24th day of last month, entered on page 66 of the First Book of the Registry of Tutorships and on page 209 of Book Four of the Civil Registry of Mayaguez, according to the certified copy of said order which is exhibited to me;

And of the second part, Doña Juliana Maria Albertucci y Alvarez, widow of Dominguez, of full age, property-owner, and resident of San Germán.

I certify to my acquaintance with the appearing parties and to their occupation and residence, and they assure me that they are in the full and free exercise of their civil rights; and I, the Notary, consider them to have sufficient legal capacity to execute the
22 present instrument; by virtue whereof the Messrs. Monagas y Cedó and Mrs. de la Rosa freely and voluntarily state:

First. That there belongs to them legitimately in full ownership and dominion the following urban property:

"A brick house of one story with flat roof, having three iron doors in front and five on the left side going out, with iron columns to sustain the roof, upon which there is a brick mirador roofed with galvanized iron, the cornice having an iron railing; the house measures 12.35 meters front to the East on Peral Street, 20.02 meters in depth on the north, or Mendez Vigo street, side, 19.57 meters on the south side, and 12 meters across the west end, and is constructed on a lot forming part of the Commons of the city. This house has its principal front on said Peral Street, is marked with the number 58, and is bounded on the right as you enter by Mendez Vigo St. already mentioned, in the rear by the house of Dr. Adolfo Martinez Cerecedo, formerly of Don Juan Suaña, and on the left by that of Don José Ramon Castro, today his heirs, and Don Rafael Blanes as co-owners.

Second. The house described belongs to the appearing parties, Messrs. Monagas y Cedó and Mrs. de la Rosa, in the proportion of an undivided one-fourth part to each. The three first obtained their shares by testate inheritance from their father, Don Carlos Joaquin Monagas, as results from the division made and protocolized in the Notarial office of Don Mariano Riera Palmer by deed No. 610 in Mayaguez on the 15th of August, 1901, which I have before me by certified copy, said shares being recorded at page 136 of Book 21 of Mayaguez, property number 391 duplicate, seventh inscription. And Mrs. de la Rosa obtained hers by purchase from Don Rafael Monagas y Cedó by deed executed in Mayaguez before the Notary Don Mariano Riera Palmer on the 14th of April, 1904.

Third. The Messrs. Monagas y Cedó and Mrs. de la Rosa assert that there is neither charge nor lien of any kind upon the house herein described belonging to them.

Fourth. The appearing parties, Messrs. Monagas y Cedó and Mrs. de la Rosa, have made an agreement to sell, as they do sell with a covenant of return, to the other appearing party, Doña Juliana Maria Albertucci y Alvarez, the property described in the first stating paragraph with all its annexed appurtenances, uses and servitudes without any reservation, for the agreed price of six thousand dollars, official money of the United States, which the sellers declare they have received from the purchaser in cash before this act and for which they execute to her the most formal and effective release.

Fifth. It is furthr agreed that if the sellers jointly, or any one of them separately, at the expiration of the term of two years, reckoned from this day, return the six thousand dollars and also pay all the costs incurred in the making of the present contract the purchaser will execute to them or their representatives a deed of re-sale; but if said term shall transpire without their having utilized the right of redemption, the present shall acquire an absolute and irrevocably consum-ated character, the corresponding marginal note in that case to be entered, and in the meantime the purchaser can only dispose of the property within the limitations prescribed by the Mortgage Law of which she has been advised; it being understood that said right of re-purchase cannot be utilized by the sellers partially but only as a whole and at the maturity stated.

23 Sixth. The condition is agreed to that if the purchasers should desire to extend the term stipulated of two years which they may avail themselves of for redemption for one year more they shall be entitled to obtain it, provided they avail themselves of said option before the end of the said two years, which in order to have legal effect must be made to appear by an authenticated document and be inscribed in the Registry of Property; and if the sellers avail themselves of this right of option they must expend from their own funds the sum of one hundred dollars in such repairs to the house sold as may be most useful and necessary.

Seventh. The purchaser, Mrs. Albertucci, shall enter into possession and enjoyment of the property which by the present deed she acquires without the necessity of any other step than that of executing this instrument, without other limitation than that of complying with the contract of lease which the sellers have celebrated with Infanzon, Rodriguez & Company and which expires in the month of November of the current year, the purchaser collecting the rent from this date.

Eighth. The appearing party Don Juan Antonio Monagas y Cedó freely and voluntarily gives his absolute consent to his wife Mrs. de la Rosa, likewise an appearing party, for the sale of the undivided interest which belongs to her in the property sold as described in the first stating paragraph, which she acquired after marriage.

Such is the deed of sale of an urban property with a covenant for return which the executing parties formulate, the stipulations of which they are obliged to recognize and conform, expressly submitting themselves to the jurisdiction of the competent tribunals of this District for all the acts and proceedings which may arise by reason of this contract, the sellers remaining bound to guarantee their title according to law, of which I instructed them.

I, the Notary, gave to the executing parties the following warnings:

First. That the sellers having acknowledged receipt, as they had done, of the six thousand dollars, the amount of the sale for which this deed was made, the property sold remains free from all responsibility on that account, even if it be afterwards proven that such delivery was not made in whole or in part.

Second. That a legal mortgage remains reserved in favor of the Insular and Municipal Treasury, by virtue whereof they have a preference for the collection of the taxes upon the property referred to imposed and not paid.

Third. That this deed should be recorded in the Registry of Property without which requisite it will not prejudice a third person with a better right, nor will it be admissible before the Tribunals or in the Public Offices, except in the cases and for the exceptional effects which the law determines, of which I informed them.

Thus they stated and signed, the subscribing witnesses being Don Antonio Amill Negroni and Don Miguel Angel Gimenez, of full age, residents of this vicinity, qualified for such duty. And all of them being advised of the right which the law gives them to read for themselves this document, of which they did not avail themselves, I proceeded to read it literally, and its contents are ratified by the

executing parties who sign with the witnesses, all of which I, the certifying Notary, warrant. (Signatures and reburication follow.)

24 II.

Upon the execution of this document the defendant took possession of the property described therein and thereafter collected the rents thereof, and the plaintiffs received said sum of six thousand dollars.

III.

On the 31st day of July, 1908, Juan A. Monagas wrote the defendant the following letter:

"MAYAGUEZ, *July* 31, 1908.

Mrs. Julia Albertucci, widow of Dominguez, San Germán.

DEAR MADAM: As the time is approaching when the contract of re-purchase will mature which we entered into with you under date of the 6th of September, 1906, before the Notary, Mr. Miguel Juan Llaneras, we have the satisfaction of informing you that, in accord*ing*- with said contract, we will fulfill the conditions necessary to extend the day of its maturity to the 6th day of September, 1906.

Therefore be good enough to inform us what day we shall be able to execute the public instrument of extension, bearing in mind that according to the contract it must be done before the maturity of the re-purchase, which will be the coming 6th of September of the current year.

(Signed) JUAN A. MONAGAS."

IV.

On the 14th day of September, 1908, the defendant recorded in the Registry of Property of Mayaguez the consummation of the sale of the house on account of the term fixed for its redemption having expired.

V.

On the 17th day of October and the 24th day of December, 1908, and on the 5th day of May, 1909, the same Juan A. Monagas wrote Mrs. Julia Albertucci to the following effect:

"MAYAGUEZ, *October* 17, 1908.

Mrs. Julia Albertucci, widow of Dominguez, San Germán.

DEAR MADAM: In accordance with your very courteous letter of the 3rd of August, which was opportunely complied with, I hope you will please inform me what day I may pass by San Germán to sign with my brothers the deed of extension of the re-purchase already agreed to and accepted by you in your said letter of August 3rd of the current year.

Thanking you for your reply, I remain,

Yours very respectfully,

(Signed) JUAN A. MONAGAS.

25 "MAYAGUEZ, *December* 24, 1908.

Mrs. Julia Albertucci, widow of Dominguez, San Germán.

DEAR MADAM: As I have not had the pleasure of receiving your reply to my letter which I addressed you under date of the 17th instant, permit me to confirm it in all its parts, begging you again to please advise me what day I may pass by San Germán with my brothers to sign the deed of extension of the contract of re-purchase already agreed upon and, as I said in my former letter, accepted by you in your very courteous letter of the 3rd of August last.

(Signed) JUAN A. MONAGAS."

"MAYAGUEZ, *May* 5, 1909.

Mrs. Julia Albertucci, widow of Dominguez, San Germán.

DEAR MADAM: I beg of you very urgently to be so good as to inform me by return mail what day I can pass by that city for the purpose of canceling the agreement of resale by making payment of the amount which my brothers and I owe you. The fact that you may have recorded said property in your own name signifies nothing, as you know that it was extended before its maturity by your very courteous letter of the 3rd of August, 1908. It is not our intention to do you injury, but neither are we disposed to suffer any detriment to our interests, much less as we have a transaction involving the property transferred to you already completed and lacking only the delivery of the corresponding deeds.

(Signed) JUAN A. MONAGAS."

Although in the statement of the case by the court below it is stated that there was presented a letter written by Mrs. Albertucci agreeing to the extension, that letter does not appear in the record. Mrs. Julia Albertucci made no reply to the letters of October 17 and December 24, 1908, and May 5, 1909.

VI.

On the 14th day of August, 1909, the plaintiffs presented their original complaint, which was amended on November 10, 1909, in the form in which it appears in the record.

VII.

The record shows that the defendant excepted to the admission of certain evidence of the plaintiffs with regard to the contract which was presented as proof, which incident appears in the report of the trial in the following form:

"The plaintiff JUAN A. MONAGAS being called to testify as a witness for plaintiffs was duly sworn and stated the following:

26 that his name is Juan A. Monagas and he is one of the plaintiffs in this suit. Thereupon counsel for defendant interposed, stating: that in view of the structure of the complaint he understands it is proposed to deprive of efficacy a public document

which at the same time the same party declares to be valid, and he maintains that verbal proof for that purpose is impertinent, since it is not being attempted to clear up doubts, to corroborate the document or to strengthen it, but it is attempted specifically to take away the efficacy of the document, to discredit the validity of the document—a document which at the same time the same party regards as valid, and he objects to oral proof against the validity and efficacy of that document.

Counsel for plaintiffs stated: that what he proposes to prove is that the document is not a sale, that it was not the intention of the parties that it should be a sale but that it should be a mortgage, and with that object he is calling witnesses.

Counsel for defendant stated: that if the attempt was to prove it was a mortgage, it being known that the condition of a mortgage and the existence of a valid mortgage simply is that it be made so to appear in a public document, he regards it as impertinent to attempt to make prevail here the merits of a mortgage which is not legally drawn.

The court admi[illegible]the proof, and the defendant takes an exception.

The witness then proceeded to testify in substance that he applied to the defendant for a loan and she made him an offer to make the negotiation, taking the house in question as security under the conditions stated in the written contract; that he had no intention of selling the house to defendant, as he had other better offers; and that the contract was made in the form of a deed of sale with option of return because she requested it and he had no objection.

VIII.

The court below rendered judgment on the 7th day of March, 1910, and both parties appealed from the same, the plaintiffs having assigned the following errors:

1. The court erred in considering it proven that it was agreed between the plaintiffs and defendant that the latter should take possession of the house and collect the total income of the same in lieu of interest, because from the record no such agreement about interest appears proven.

2. The court erred in not adjudging that the defendant render an accounting of the income received from the house from the time she entered into possession of it.

3. The court erred in not adjudging that defendant only had a right to the collection of the principal sum of six thousand dollars and legal interest thereon from the date of the loan, at the rate of six per centtum per annum, according to the provisions of Section 1075 of the Civil Code.

27 4. The court erred, in violation of Section 361 of the Civil Code, in not adjudging that the rents produced by the house in question belonged to the plaintiffs, considering that the ownership of both real and personal property carries with it the right by accession to everything which it produces, whether separated from it or incorporated in it naturally or artificially. And if the court adjudges that the ownership of the house is in the plaintiffs, it must

necessarily also adjudge that its rents or profits belong to the same persons.

IX.

The defendant presented no formal assignment of errors but impugned the judgment pronounced by the court below in so far as it declared that the contract entered into on the 6th of September, 1906, hereinbefore set forth, was one of mortgage and not one of sale with agreement to return, invoking the legal precepts which she deemed pertinent.

This Supreme Court disposed of the appeal by its judgment of June the 5th of the last year, reversing that rendered by the court below and ordering the dismissal of the complaint, not only upon the ground that the exception to which we have already referred was well taken and should have been sustained, but also because the agreement made by the parties was a conditional sale.

In witness whereof, and in order that this statement may become a part of the record in the case to which the same refers, we, the Justices of the Supreme Court of Porto Rico, sign it, this 29th day of June, A. D. 1912.

JOSÉ C. HERNANDEZ,
Presiding Justice of the Supreme Court of Porto Rico.
ADOLPH G. WOLF,
EMILIO DEL TORO,
Associate Justices.

28 In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS et al., Plaintiffs and Appellants,
vs.
JULIANA MARIA ALBERTUCCI Y ALVAREZ, Defendant and Appellee.

Come now the plaintiffs and appellants, by their counsel N. B. K. Pettingill, and move the court to direct that the contents of the Transcript of Record upon the appeal from this Court to the Supreme Court of the United States be composed of the following matters and proceedings and no others, translated into English, to wit:

1. The amended complaint. (Pages 47 to 51 of the record in this Court.)
2. The answer to same. (Pages 53 to 56.)
3. The finding of facts and conclusions of law stated by the District Court. (Pages 58 to 61.)
4. The judgment of the District Court (Pages 62-3).
5. Recital of the taking of appeal by each of the parties. (Pages 64-5.)
6. The opinion of this Court (Pages 117 to 120).
7. The judgment of this Court (Page 125).
8. The statement of facts in the nature of a special verdict made by this court. (Pages 154-161.)

9. The appellate proceedings from this Court to the Supreme Court.

N. B. K. PETTINGILL,
Counsel for Appellants.

29 UNITED STATES OF AMERICA, *ss:*

Supreme Court of Porto Rico.

I, Eugenio Alvarez, Acting Secretary of the Supreme Court of Porto Rico, do hereby certify:

That all of the foregoing documents, transcribed on pages 1 to 28, inclusive, are found in and form part of the record in a certain cause, number 561, lately pending in said Supreme Court, wherein Juan A. Monagas, José Arturo Monagas, Oscar Procopio Monagas and Rosario de la Rosa are plaintiffs and appellants, and Juliana María Albertucci, widow of Dominguez, is defendant and appellee; that of such documents those whose originals were written in the English language are true and correct copies, and those whose originals were written in the Spanish language have been truly and correctly translated into English, according to the certificate of Mr. Mario S. Geigel, translator of this office, hereto attached; and that this record has been prepared in accordance with the præcipe filed herein by counsel for the appellants, a copy of which is also made a part hereof.

In testimony whereof, I hereunto set my hand and affix the seal of said Supreme Court, at San Juan, Porto Rico, this twelfth day of July, A. D. 1912.

[Seal Supreme Court of Porto Rico, United States of America.]

EUGENIO ALVAREZ,
Acting Secretary of the Supreme Court of Porto Rico.

30 In the Supreme Court of Porto Rico.

No. 561.

JUAN A. MONAGAS, JOSÉ ARTURO MONAGAS, PROCOPIO MONAGAS Y ROSARIO DE LA ROSA, Plaintiffs, Appellants & Respondent-,

vs.

JULIANA MARÍA ALBERTUCCI Y ALVAREZ, Widow of Dominguez, Defendant, Appellant & Respondent.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Juliana María Albertucci y Alvarez, widow of Dominguez, and Miguel Juan Llaneras, her attorney:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., within sixty days from the date of this writ, pur-

suant to an appeal filed in the office of the Secretary and Reporter of the Supreme Court of Porto Rico, in a certain cause lately pending in said Court, wherein Juan A. Monagas, José Arturo Monagas, Oscar Procopio Monagas, y Rosario de la Rosa, are plaintiffs, appellants and respondent-, and you are defendant, appellant and respondent, to show cause, if any there be, why the judgment rendered therein against the said plaintiffs, appellants and respondent-, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. José C. Hernandez, Chief Justice of the Supreme Court of Porto Rico, at the city of San Juan, P. R., this 13th day of November, in the year of Our Lord, one thousand nine hundred and eleven.

[Seal Supreme Court of Porto Rico, United States of America.]

JOSÉ C. HERNANDEZ,
Chief Justice of the Supreme Court of Porto Rico.

Attest:

J. HERNANDEZ USERA,
Secretary & Reporter of the Supreme Court of Porto Rico.

Received this writ this 14th day of Nov. 1911 and served the same by sending a true copy thereof to Miguel Juan Llaneras the attorney of record by registered mail to San German P. R. This at San Juan P. R. Nov. 14, 1911 and received acknowledgment of receipt of same No-. 15 1911.

S. C. BOTHNELL, *Marshal.*

5223.

Letter } No. —.
Parcel }

P. O., SAN JUAN, P. R.

Received for registration, — 191–, from S. C. Bothnell addressed to Miguel Juan Llaneras S. German.

— class postpage prepaid.

—— ——, *Postmaster,*
Per D.

[On left margin:] U. S. Registered Mails go to every post office in the world.

Letters and parcels may be registered at any post office or at any post-office station, and by rural carriers throughout their routes. Letters will be registered by letter carriers in the residential districts of cities.

Nov. 14, 1911.

31 UNITED STATES OF AMERICA,
Island of Porto Rico:

I, Mario S. Geigel, official translator in the Office of the Secretary and Reporter of the Supreme Court of Porto Rico, do hereby certify that the foregoing is a true and faithful translation of their respect-

ive originals, as the same appear from the record in a certain case wherein Juan A. Monagas et al. are plaintiffs, appellants and respondent- and Juliana María Albertucci Alvarez widow of Dominguez, is defendant, appellant and respondent, the record number of which case is 561.

In testimony whereof, I have hereunto affixed my hand, at the City of San Juan, Porto Rico, this twelfth day of July, nineteen hundred and twelve.

MARIO S. GEIGEL,
Translator Office of the Secretary and Reporter of the Supreme Court of Porto Rico.

Endorsed on cover: File No. 23,307. Porto Rico Supreme Court. Term No. 311. Juan A. Monagas, Jose Arturo Monagas et al., appellants, vs. Juliana Maria Albertucci y Alvarez, widow of Dominguez. Filed July 24th, 1912. File No. 23,307.

19

Office Supreme Court, U. S.
FILED
MAR 19 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted] 44

JUAN A. MONAGAS ET AL., APPELLANTS,

vs.

JULIANA MARIA ALBERTUCCI.

BRIEF FOR THE APPELLANTS.

N. B. K. PETTINGILL,
Counsel for Appellants.

(23,307)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1913.

No. 311.

JUAN A. MONAGAS ET AL., APPELLANTS,

vs.

JULIANA MARIA ALBERTUCCI.

BRIEF FOR APPELLANTS.

Statement of the Case.

The appellants were complainants in the Court of First Instance, which was the District Court for the District of Mayaguez, Porto Rico, in an action brought against the appellee to redeem certain real estate from a certain instrument of conveyance in the form of a conditional sale alleged to have been intended as a mortgage to secure the sum of $6,000. The appellants prayed for a decree allowing them to redeem and for an accounting (Record, pages 1-3).

The appellee denied that the conveyance was made as security for a debt of any amount, and alleged, in substance, that the transaction was in reality, as in form, a conditional sale; that the period within which appellants could require a reconveyance had expired without any offer to comply

with the condition, and that, therefore, the property belonged absolutely to the appellee (Record, pages 4 and 5).

The trial court made findings of fact and stated conclusions of law (Record, pages 6 and 7). Among other things, it was found as a fact that the conveyance was really intended by the parties as a mortgage (page 6, paragraph III), but also found (same paragraph) that "it was agreed that defendant (appellee) should take possession of the property and should collect, as in lieu of interest, all the income from the same." The conclusions of law were that appellee should reconvey the property upon payment by appellants of the $6,000 received and a small sum expended for repairs, but that appellants were not entitled to any accounting, and a judgment was entered accordingly (page 8).

From that judgment both parties appealed to the Supreme Court of Porto Rico (page 8, bottom), where the judgment was reversed and the complaint of appellants ordered dismissed (page 11), the opinion being rendered by Mr. Justice MacLeary (pages 9-11). The appeal to this court was then taken by appellants (pages 12-14) and a finding of facts signed by the Supreme Court (pages 15-21). In that court appellants assigned four errors as having been committed by the trial court (page 20, paragraph VIII), and now in this court presents, as to the rulings of that Supreme Court, the following

Assignment of Errors.

I.

The Supreme Court of Porto Rico erred in reversing the ruling of the trial court, which overruled the objections of appellee to the oral evidence introduced by appellants to the effect that "the document (basis of the action) was not an instrument of sale, but that it had been the intention of the makers to constitute a mortgage," and in holding such evidence inadmissible.

II.

That court erred in reversing the finding of the trial court that the document (basis of the action) constituted a mortgage according to the intention of the parties, and in holding said document to constitute a contract of conditional sale.

III.

That court erred in not considering upon their merits the contentions of appellants, set forth in their assignment of errors presented to that court.

IV.

That court erred in directing the dismissal of the complaint of the appellants.

ARGUMENT.

The jurisdiction of this court to entertain this appeal is clear, as more than the value of $5,000 is involved.

Royal Ins. Co. *vs.* Martin, 192 U. S., 149.

I.

Trial Court Was Right in Ruling on Evidence.

This refers to the subject of the first assignment, and from this ruling seem to have resulted all the other errors assigned.

The finding of facts made by the territorial Supreme Court (page 19, paragraph VII) recites that the written contract between the parties having been introduced, Juan Monagas, one of the appellants, was sworn as a witness for

the purpose proving by his oral statement that "the document is not a sale, that it was not the intention of the parties that it should be a sale, but that it should be a mortgage;" to which appellee objected upon the ground, substantially, that oral evidence could not be received to vary the effect of a written instrument. The trial court overruled the objection and admitted the evidence. The finding concludes:

> "The witness then proceeded to testify in substance that he applied to the defendant for a loan and she made him an offer to make the negotiation, taking the house in question as security under the conditions stated in the written contract; that he had no intention of selling the house to defendant, as he had other better offers; and that the contract was made in the form of a deed of sale with option of return because she requested it and he had no objection."

In the course of his opinion for the Supreme Court Judge MacLeary summarizes this occurrence from the record with his conclusion as to it, as follows (page 10):

> "The record states it as follows: 'When the plaintiff, Juan A. Monagas, testified, the defendant objected that the plaintiffs were trying to introduce oral evidence to deny the existence of a written document; and that said oral evidence was inadmissible. The plaintiffs declared that they were going to prove that the document was not an instrument of sale, but that it had been the intention of the makers to constitute a mortgage. The defendant replied that only such a mortgage as appeared in a public deed was valid. The judge admitted the evidence, and the defendant **took an exception.'**
>
> "Then let us first examine this question, raised by the defendant's exception. She virtually maintains the proposition that parole evidence was inadmissible, under our Civil Code, to vary the terms of the sale; and that an improper construction was put on the written contract entered into between the parties."

Thereupon, instead of considering and discussing the contention thus stated, the judge passes to a general statement of the differing principles distinguishing a mortgage from a condition sale, concluding with the declaration that the document in question was a conditional sale rather than a mortgage, and then adds (page 11):

> "We are further satisfied that the exception of the defendant was well taken and ought to have been sustained; and that the court consequently erred in its judgment."

In their conclusions touching this matter, we submit, it was the Supreme Court, not the district court, that committed error. The conclusion as above stated is not only opposed to an earlier decision of the same Supreme Court (Horton *vs.* Robert, 3 Castro's Dec. de P. R., 410, — P. R. Rep., —), but also to a decision of this court based largely upon that decision and already published when the case at bar was decided.

Cabrera *vs.* American Col. Bank, 214 U. S., 224.

To the official report of the last-cited case are appended the pertinent sections of the law of evidence of Porto Rico (Laws of 1905). Section 25 of that law provides generally that no evidence of the terms of a written agreement other than the contents of the writing shall be admitted; then it specifies two exceptions, after which is added this limitation:

> "But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section 28, **or to explain an intrinsic ambiguity, or to establish illegality or fraud,**" etc.

And the section there referred to provides:

> "SECTION 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the

> instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

In other words, the judge is empowered to ascertain the actual intent of the parties in order that he may effectuate that intent—and for that purpose he may consider oral evidence.

Exactly to that effect, as counsel understands, was the decision of this court in the *Cabrera* case, *supra;* and the circumstances in the two cases were identical, except that the document in the *Cabrera case* was a conveyance of personal property instead of real estate, as in the case at bar. In that case the document was a notarial one, and on its face imported an absolute conveyance, a detail even stronger than in the case at bar, where the conveyance was subject to a condition. And in that case oral testimony was admitted for the purpose of proving that it was intended not simply as a mortgage, but as a mortgage *for collateral security only.*

The *Cabrera case* came here direct from the Federal court of Porto Rico; hence but one lower court had passed upon it. That court had admitted oral evidence for the purposes indicated, and that ruling was sustained by this court. In the case at bar the trial court admitted it; the court of intermediate appeal held that it should have been excluded. It is submitted that the holding of the trial court was right and should be sustained.

II.

Reversal of Trial Court as to Character of Document Induced by Erroneous Exclusion of Evidence, as Above Shown.

Following that paragraph of the opinion of the Supreme Court treating of the above question of evidence is a paragraph (page 10) beginning with the statement that "The

whole case really turns on the question whether the written instrument in controversy was a mortgage or a conditional sale," and proceeding to state some of the distinctions between the circumstances that will make an instrument either the one or the other, and to conclude that there is no material difference between the American and the Civil Law doctrines on the subject. It is then stated, without any reason or explanation, that "we must consider the conveyance in this case as a conditional sale."

If the principles stated in that paragraph of the Supreme Court's opinion just referred to, as distinguishing between a conditional sale and a mortgage, be applied to the testimony whose exclusion by that court has been discussed under the previous assignment, it will be seen that such testimony tended to prove every fact necessary to turn the conveyance into a mortgage according to those principles. Therefore, in determining to hold such conveyance to be a conditional sale, the Supreme Court must have put aside and refused to consider that evidence given by Monagas—as doubtless was proper under its holding that it was inadmissible. Hence, it is submitted, if this court determines that the Supreme Court of Porto Rico erred in holding that testimony inadmissible, it follows as a logical consequence that that error was a material factor in the conclusion of that court that the conveyance should be held a conditional sale and not a mortgage—and may have been the controlling factor; and therefore that holding should be set aside in order that appellant may have his appeal there considered upon the proper evidence.

In other words, as the trial court, admitting and considering the evidence of Monagas upon the point contested, reached the conclusion that the conveyance was intended as a mortgage and not a conditional sale, it is a reasonable presumption that the Supreme Court would have arrived at the same conclusion had it also felt authorized to consider that evidence. In any event, the Supreme Court having failed to consider all the material and admissible evidence

upon a vital point, its judgment should be reversed and the cause remanded to it for a reconsideration with due weight given to all proper evidence including that of Monagas.

III.

Errors Assigned in Supreme Court of Porto Rico Not Considered on Their Merits.

This error, the subject of the third assignment here, was another consequence of the erroneous rulings considered under the two previous heads.

At the close of the opinion of Judge MacLeary (page 11, top par.), it is stated:

> "Since all the plaintiffs' assignments of error are based on the assumption that the fundamental instrument of writing was a mortgage and we find it to be a conditional sale, it is unnecessary to further consider them here."

Turning to those assignments (page 20, par. VIII) it will be seen that they raise substantial questions both of fact and of law touching that part of the judgment of the trial court unfavorable to said plaintiffs, appellants here. Therefore, if there was error on the part of the Supreme Court in sustaining the grounds of appeal assigned by the present appellee and dismissing the complaint of appellants, there was further error in failing to give consideration to the merits of the grounds of appeal assigned by these appellants, and the latter are entitled to a reversal and remand for the purpose of obtaining such consideration.

IV.

Complaint of Appellants Should Not Have Been Ordered Dismissed.

From the record in this cause it becomes evident, as hereinbefore argued, that the judgment of the Supreme Court directing the dismissal of the complaint was the result of its finding that the conveyance referred to in the complaint was intended as a conditional sale instead of a mortgage, and that that finding was the result of the exclusion of the evidence referred to in the first assignment of error. Hence, if the Supreme Court was wrong in holding that evidence inadmissible, it follows necessarily that it was wrong in ordering the dismissal of the bill.

But even if that court were right in holding that the evidence referred to should be excluded it was still wrong in adjudging the dismissal of the complaint. Having by its ruling upon evidence deprived plaintiffs (there appellees in respect of that question) of testimony vital to their case and sufficiently convincing to induce a favorable judgment from the trial judge, justice required that the cause should be returned to the trial court for further proceedings, so that plaintiffs might produce proof to meet the requirements of the law as thus declared, if in truth such proofs existed.

In conclusion, therefore, it is submitted that the judgment of the Supreme Court of Porto Rico should be reversed and remanded, with directions to that court either to reconsider the same itself, giving due weight to the evidence formerly excluded, or to reverse its judgment of June 5, 1911, and remand the cause to the District Court of Mayaguez for such further proceedings as that court may be advised.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellants.